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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-379

ROCKNEY LEE REED,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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---

The petitioner, Rockney Lee Reed, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 16, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A to this petition. No written opinion was filed by the United States District Court for the Northern District of California. The order adjudging petitioner in civil contempt appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 16, 1971, affirming the order of the United States District Court for the Northern District of California adjudging petitioner in civil contempt of court. This petition for writ of certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

Whether a witness subpoenaed to testify before a Federal Grand Jury has standing to object to the questions propounded to him on the ground that said questions were derived from illegal wiretapping or other electronic surveillance.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourth Amendment
Title 18, United States Code, Sections
2511(1)
2515
2518(10)(a)
Supreme Court Rules, Rule 19.
These provisions are fully set forth in Appendix C.

STATEMENT OF THE CASE

On June 17, 1971, Rockney Lee Reed appeared, pursuant to subpoena, before a Special United States Grand Jury inquiring into alleged violations of federal laws relating to the importation of marijuana. Petitioner invoked his privilege against self-incrimination in response to a number of questions concerning activities in this area. Thereafter petitioner was granted immunity on application of the

United States, but again declined to answer the grand jury's questions on the ground that they were derived from illegal electronic surveillance of his house and telephone, in violation of the Fourth Amendment and federal statutes.

On July 14, 1971 petitioner appeared with counsel before the United States District Court for the Northern District of California and moved to suppress the use, before the grand jury, of any evidence derived from illegally intercepted wire or oral communications directed against him. This motion was made pursuant to Title 18, United States Code, Sections 2518(10)(a) and 2515. The Court denied the motion and ordered petitioner to answer the grand jury's questions. Petitioner appeared as directed before the grand jury, but again declined to answer on the ground that the questions were derived from illegal monitoring of his home and telephone. The District Court thereafter held petitioner in civil contempt of court and committed him to the custody of the United States Marshal.

On August 16, 1971 the order adjudging petitioner in civil contempt was affirmed by the Court of Appeals for the Ninth Circuit. This affirmance was based solely on the authority of recent cases decided by that court which held that a grand jury witness is without standing to object to questions propounded to him on the ground that they were derived from information obtained through illegal electronic surveillance directed against him.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with decisions of other courts of appeals on the same matter.

In its brief opinion affirming the order adjudging petitioner in civil contempt, the Court below stated that "[i]n our opinion, all of Reed's arguments are precluded by the specific holdings, or the necessary implications of the deci-

sions of this court in *United States v. Gelbard* and *United States v. Parnas*, ...F.2d.... (9th Cir. June 8, 1971); *In re Leslie Bacon v. United States*, ...F.2d.... (9th Cir. June 24, 1971); and *Olsen v. United States*, ...F.2d.... (9th Cir., August 6, 1971), relating to standing." These cases hold that a grand jury witness lacks standing to move to suppress, or otherwise object to the use, by the prosecutor before the grand jury, of evidence or information obtained through illegal wiretapping. In *Gelbard, supra,* the first in this line of cases, the court considered whether such a witness could move to suppress under Title 18, United States Code, Section 2518(10)(a), which provides that:

> "Any aggrieved person in any trial, hearing, or proceeding . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that . . . (i) the communication was unlawfully intercepted . . ."

The court, quoting from *Dudley v. United States,* 427 F.2d 1140 (5th Cir. 1970), concluded that this section did not create "a statutory exception which would permit a pre-indictment motion to suppress evidence that might be presented to the grand jury."

Subsequent to *Gelbard,* the Court of Appeals for the District of Columbia Circuit reached the opposite conclusion. *In re Carol Evans,* ....F.2d.... (D.C. Cir. July 23, 1971). In that case Judge Bazelon, writing for the majority, disagreed with the emphasis placed by the Ninth Circuit upon an ambiguous paragraph from the legislative history, and pointed out the numerous circumstances wherein grand jury witnesses had been permitted to claim constitutional, and even common law privileges not to produce testimony or documents. e.g., *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920) (Fourth Amendment privilege); *Blau v.*

United States, 340 U.S. 332 (1951) (marital privilege). Thus the Court held that section 2518(10)(a) did provide for a motion to suppress by a grand jury witness.

In the court below petitioner also contended, unsuccessfully, that, even without section 2518(10)(a), his refusal to answer the allegedly tainted questions was justified by Title 18, United States Code, Section 2515, which provides as follows:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, *grand jury*, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." (emphasis added)

Here too the decision of the court below is in conflict with the decisions of other courts of appeals. In the recent case of *In re Joques Egan*, ...F.2d.... (3d Cir., May 28, 1971) the Court of Appeals for the Third Circuit, sitting *en banc*, held that the above section constitutes an unequivocal bar to questioning a grand jury witness if the questions were derived from illegal electronic surveillance directed at the witness, and if he objects to the interrogation. To the same effect is *In re Liberato J. Maratea*, ...F.2d.... (3d Cir. June 14, 1971)

In the *Egan* case, *supra*, the majority opinion went on to declare that, irrespective of a witness' rights under the provisions of the statute, he has a constitutional right under the Fourth Amendment to refuse to answer grand jury questions based on information derived from illegally intercepted communications. Petitioner raised this point in the

court below, citing *Katz v. United States,* 389 U.S. 347 (1967); *Silverthorne Lumber Company v. United States,* 251 U.S. 385 (1920); and *Alderman v. United States,* 394 U.S. 165 (1969), but the court held that this approach too was foreclosed by its prior decisions.

In each of these respects, the decision below is in conflict with decisions of other courts of appeals. In these other cases review is being sought. The Government has filed petitions for writs of certiorari in *Evans, supra* (Number 71-256) and *Egan, supra,* (Number 71-263) 40 U.S.L.W. 3091 (August 31, 1971). A petition has also been filed seeking review of the *Gelbard* decision upon which the court below relied. *Gelbard v. United States,* No. 71-110, 40 U.S.L.W. 3049 (July 27, 1971). It is submitted that this Court should grant certiorari in this case to resolve this conflict between the various circuits.

2. The decision below concerns an important question of federal law which should be settled by this Court.

This case presents an issue which, as evidenced by the conflicting decisions cited above, has been arising with increasing frequency in Federal Courts throughout the country. The issue is the scope of protection afforded by the Fourth Amendment, and by its statutory counterparts, to a grand jury witness who claims that the questions propounded to him by the Grand Jury were derived from illegal electronic monitoring of his house or telephone. The Omnibus Crime Control and Safe Streets Act of 1968 has presented this issue in sharp relief by permitting limited, authorized wiretapping, and prohibiting the use of the fruits of unauthorized electronic surveillance.

In *Katz v. United States,* 389 U.S. 347 (1967), this Court held that the Fourth Amendment prohibits unreasonable electronic surveillance, without regard to whether a tres-

pass is involved. This brought illegal wiretapping within the rules developed by the courts to prohibit the use of illegally seized evidence. In *Silverthorne Lumber Company v. United States,* 251 U.S. 385 (1920), it was held that a grand jury witness could not be held in contempt for failing to comply with a subpoena *duces tecum* issued as a product of an illegal search. Thus the standing of a grand jury witness to raise the issue of an illegal search or seizure directed at him should be free from all doubt. Indeed, this is in accord with general standing rules which permit a person to complain of a violation of his Fourth Amendment rights provided that the search in question was directed against him. *Alderman v. United States,* 394 U.S. 165 (1969), *Jones v. United States,* 362 U.S. 261 (1960).

Yet the Court below has held that petitioner is without standing to vindicate his constitutional rights under the Fourth Amendment. This is even more surprising in view of the express statutory provisions which appear to provide him with such a remedy. Section 2515 flatly prohibits the use of illegally intercepted communications before a grand jury. If the grand jury witness cannot decline to answer questions based on information derived from such illegal activities, it is difficult to perceive how this express prohibition can be given meaningful effect. The effect of the decision below is actually to sanction the prosecutor's use of information gained through illegal wiretapping [use which carries severe criminal penalties under 18 U.S.C. § 2511(1)], and to make the court a party to this illegality by its use of the contempt power to require the witness to answer the tainted questions. It is difficult to harmonize this situation with this Court's observation that "Courts which sit under our constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by

permitting unhindered use of the fruits of such invasions." *Terry v. Ohio,* 392 U.S. 1, 13 (1968).

It is respectfully submitted that this Court should grant this petition to decide this important question of federal law.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California, September 13, 1971.

Respectfully submitted,

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Appendix A

OPINION

United States Court of Appeals
For The Ninth Circuit

No. 71-2183

In the Matter of
ROCKNEY LEE REED, a witness before the Special Grand Jury,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

[August 16, 1971]

Appeal from the United States District Court
for the Northern District of California

Before: HAMLEY, MERRILL and KOELSCH, Circuit Judges PER CURIAM:

This is an appeal from a district court order adjudging Rockney Lee Reed to be in civil contempt for refusing to obey a district court order requiring him to testify before a special grand jury. Reed contends that questions propounded to him were based upon information obtained as a result of illegal wiretapping and that he was accordingly entitled to an order suppressing such information and entitled to refuse to testify. We affirm.

On this appeal, Reed's arguments are based upon 18 U.S.C. §§ 2515 and 2518(10)(a), and upon the Fourth Amendment. In our opinion, all of Reed's arguments are precluded by the specific holdings, or the necessary implications, of the decisions of this court in *United States v. Gel-*

bard and United States v. Parnas, ... F.2d ..... (9th Cir. June 8, 1971); *In re Leslie Bacon v. United States,* ..... F.2d ..... (9th Cir. June 24, 1971); and *Olsen v. United States,* ..... F.2d ..... (9th Cir. August 6, 1971), relating to standing.

We decline to reexamine those decisions for the reason that this could only be done *en banc,* and the time allowed us under 28 U.S.C. § 1826 to decide this appeal will not permit this to be done. See *In re Charleston v. United States, In re Herlicy v. United States,* ..... F.2d ..... (9th Cir. June 16, 1971).

Counsel for appellant advised us at oral argument that in the event of affirmance he would apply for a writ of certiorari. Issuance of the mandate herein is therefore stayed thirty days to enable appellant to apply for a writ of certiorari. If a timely application for such a writ is filed, the stay shall remain in effect until the application has been denied, or, if granted, until the cause has been determined by the Supreme Court.

Appendix B

ORDER OF CONTEMPT

United States District Court
Northern District of California

Misc. No. 10816

In Re: Rockney Lee Reed, a Witness before the Special Grand Jury

ORDER

On motion of Maurice K. Merten, Special Attorney, Organized Crime and Racketeering Section, U.S. Department of Justice, for an Order by the Court pursuant to 28 U.S.C. 1826 to enforce its Order of July 14, 1971, heretofore entered in the above-entitled matter, the respondent, ROCKNEY LEE REED, appearing before the Court in person and with counsel, and said respondent having refused to testify and produce evidence before and to the Special Grand Jury for the Northern District of California, after being so Ordered by this Court, and the Court having heard argument of counsel;

IT IS ADJUDGED that respondent, ROCKNEY LEE REED, is in civil contempt of this Court for his failure to obey the Order of this Court dated July 14, 1971, heretofore entered herein.

IT IS THEREFORE ORDERED, pursuant to 28 U.S.C. 1826, that respondent, ROCKNEY LEE REED, be and hereby is committed to the custody of the United States Marshal for the Northern District of California, for confinement until such time as said respondent shall obey this Court's Order of July 14, 1971 or for the duration of the term of the Special Grand Jury for the Northern District of California, including extensions, but in no event shall such confinement exceed eighteen (18) months.

United States District Judge

Dated: .....

Appendix C

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment Four

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18, United States Code, Section 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose

of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection:

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18, United States Code, Section 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Title 18, United States Code, Section 2518

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be the interests of justice.

Supreme Court Rules Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or any other court whose determinations are by law reviewable on writ of certiorari.

SUPREME COURT, U. S.

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No. 71-379

In the Supreme Court of the United States

OCTOBER TERM, 1971

ROCKNEY LEE REED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-379

ROCKNEY LEE REED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On July 15, 1971, the United States District Court for the Northern District of California adjudged petitioner in civil contempt for refusing to answer questions before a special grand jury after he had been granted "transactional immunity", that is immunity from prosecution with respect to any matters testified to under compulsion, under 18 U.S.C. 2514. The court committed petitioner to prison until such time as he answered the questions or the term of the grand

jury expired. On August 16, 1971, following an expedited appeal, the court of appeals affirmed.

1. On June 17, 1971, petitioner was summoned to appear before a special federal grand jury in the Northern District of California which was investigating narcotics violations. After petitioner invoked the privilege against self-incrimination, he was given transactional immunity under 18 U.S.C. 2514. Petitioner again refused to testify to the grand jury's questions, this time on the ground that the questions were derived from illegal electronic surveillance.

Thereafter, on July 14, 1971, he was brought before the district court. At that time, petitioner relying on 18 U.S.C. 2518 (10)(a) and 2515, moved to suppress the use of "any and all wire or oral communications received as the result of illegal searches of his person and premises". He filed a supporting affidavit stating that his father told him that he was working with federal agents in connection with an investigation of smuggling operations involving one Alistair Honeyman [1] and that his father informed him that his telephone wires were being tapped and that his home was being surveilled with electronic surveillance equipment.[2] Petitioner also stated that an open back door and open telephone box made him believe that there had been interceptions of his communications.

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[1] The grand jury had indicted Honeyman.

[2] Petitioner also stated in his affidavit that his father had identified individuals in front of his house as federal agents.

At the hearing on July 14, 1971, the government attorney involved in the grand jury investigation stated under oath that neither petitioner nor his premises had been the subject of any electronic surveillance and that none of his conversations had been intercepted (Tr. 5, 8, 10, 13, 17-19, 23). Petitioner stated that he would be willing to be cross-examined as to what his father told him but did not offer to call his father as a witness (Tr. 12). Following this hearing, the court ordered petitioner to appear before the grand jury and answer its questions (Tr. 28).

The next day, when petitioner appeared before the grand jury he refused to answer questions such as whether he was engaged in activity that resulted in the importation of marihuana from Mexico, whether he was on a vessel that returned from Mexico on May 3, 1970, with approximately three and a half tons of marihuana, whether he was involved in the concealment and sale of this marihuana (Tr. 35-39). He refused to answer these questions on the ground that they were derived from wiretaps (Tr. 37). He identified his father, who he said claimed to be a federal agent, as the source of this information. Petitioner admitted, however, that as far as he knew his father was in private business (Tr. 40-45). The government attorney again advised petitioner that there had been no wiretaps of his home.[3] Thereafter, peti-

[3] In response to a statement by petitioner that his father had informed him of a telephone tap the previous night, the government attorney told petitioner that the father, who had testified before the grand jury, was in the State of Washington on the previous night (Tr. 46-47).

tioner was brought before the district court. His request for a further hearing to examine the agents involved in this case was denied.

2. Petitioner has no valid excuse for refusing to answer the questions of the grand jury. The government without equivocation denied that he had been the subject of any electronic surveillance and denied that any of his conversations were overheard. This denial sufficiently answered petitioner's statement that his father told him that he was subject to an illegal electronic surveillance. Moreover, at the hearing petitioner did not call his father as a witness to support the statement.

In light of this denial by the United States, this case does not conflict with the decisions in *United States* v. *Evans*, *United States* v. *Fishlowitz*, No. 71-256, filed August 20, 1971, or *United States* v. *Egan*, *United States* v. *Walsh*, No. 71-263, filed August 20, 1971. In those cases, the government did not affirm or deny the occurrence of the alleged unlawful surveillance. See 18 U.S.C. 3504. Nor does it raise the same issue as *Gelbard* v. *United States*, No. 71-110, filed July 22, 1971, upon which the court below relied, where the government disclosed to each petitioner that he had been overheard during court-authorized wiretaps. Whether or not a grand jury witness has standing to refuse to answer on the ground that his conversations have been overheard by illegal electronic surveillance, and whether or not he is entitled to a hearing on legality when the government acknowledges that overhearings have occurred, a witness should not be allowed to refuse to answer on the

basis of a naked assertion that he has been illegally overheard, when that assertion is unsupported by any credible evidence and the government categorically denies that any overhearing has taken place. Cf. *United States* v. *Cook*, 432 F. 2d 1093, 1108-1109 (C.A. 7), certiorari denied, 401 U.S. 996.

Thus, this Court should not delay its disposition of this case pending its determination of the cases cited above, especially since delay might encourage others to raise equally fanciful claims of illegal overhearing. Congress clearly did not intend to allow grand jury proceedings to be frustrated in the circumstances of a case such as this.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

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